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ONE HUNDRED SIXTH CONGRESS

# Congress of the United States

## House of Representatives

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August 2, 1999

### BY FACSIMILE

The Honorable Jacob J. Lew  
Director  
Office of Management and Budget  
Washington, D.C. 20503

Dear Director Lew:

This letter responds to a July 20, 1999 letter from Office of Information and Regulatory Affairs Administrator John T. Spotila in response to my June 2nd letter to you on the Office of Management and Budget's (OMB) March 30th "Guidance for Implementing the Congressional Review Act." My April 1st and June 2nd letters reiterated the views expressed in the Subcommittee's March 29th meeting with OMB staff on OMB's statutorily-required, draft revised Congressional Review Act (CRA) guidance to the agencies; namely, that OMB's latest guidance is not responsive to Congressional expectations, our previous agreements, or Congressional intent for expanded and complete OMB guidance to be issued by March 31st.

OMB's July 20th letter asserts that OMB's March 30th revised guidance was "coordinated" with the staff of the Subcommittee on National Economic Growth, Natural Resources and Regulatory Affairs, which I chair. I am uncertain what "coordinated" means to OMB in this context. Last Fall, we provided OMB with a draft guidance document that fully addressed the issue areas that were not reflected in OMB's guidance. We were surprised and disappointed that OMB's March 25th draft, revised guidance did not reflect the issue areas in our draft guidance document, and we expressed our dismay in the March 29th meeting.

My June 2nd letter asked OMB in its elaboration of the definition of "rule" under CRA to include agency interpretive rules, policy statements, guidances, and other documents of general applicability and future effect that interpret, prescribe, or implement policy, regardless of whether such documents are represented to be legally "binding." OMB's July 20th response that its definition of "rule" is based on the Administrative Procedure Act definition of "rule" is unacceptable given the legislative history and intent of the CRA.

As the legislative history of the CRA explains, the authors specifically chose the definition of 5 USC §551 to extend the scope of the CRA beyond the scope of rules subject to the

notice and comment provisions of 5 USC §553: "The committees intend this chapter to be interpreted broadly with regard to the type and scope of rules that are subject to congressional review. The term 'rule' in subsection 804(3) begins with the definition of a 'rule' in subsection 551(4) . . . . The definition of a rule does not turn on whether a given agency must normally comply with the notice and comment provisions of the APA, or whether the rule at issue is subject to any other notice-and-comment procedures. . . . The committees are concerned that some agencies have attempted to circumvent notice-and-comment requirements by trying to give legal effect to general statements of policy, 'guidelines,' and agency policy and procedure manuals" (Statement of Rep. Hyde, CONG. REC., April 19, 1996 at E578). As a consequence, by August 13th, please provide the Subcommittee with OMB's legal analysis to support a more limited definition of "rule."

My June 2nd letter also asked OMB to provide: (a) a discussion of the limitations of the "good cause" exemption for a change in the effective date of rules, including clarification that the exemption cannot be used for rules previously subject to notice and comment; and (b) a discussion of the legal standing, effectiveness, and potential for judicial review of rules not submitted to Congress pursuant to section 801(a)(1). OMB's July 20th response that OMB "respects your views, but still believes that the guidance is worded appropriately" is not responsive to the specific information requested under (a) and (b) and is unacceptable. Please provide the specific requested information by August 13th.

If you have any questions about this letter, please contact Professional Staff Member Barbara Kahlow at 225-4407.

Sincerely,



David M. McIntosh

Chairman

Subcommittee on National Economic Growth,  
Natural Resources and Regulatory Affairs

cc: The Honorable Dan Burton  
The Honorable Dennis Kucinich  
The Honorable Jim Kolbe